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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BRYAN HARLEN RANGER, Defendant and Appellant.	A152704 (Del Norte County Super. Ct. No. CRF-139534)

A jury convicted Bryan Harlen Ranger of one count of aggravated sexual assault of a child by rape (Pen. Code, § 269, subd. (a)(1); count one),[1] and nine counts of forcible lewd act on a child (§ 288, subd. (b)(1); counts two through four, six, and eight through 12). Ranger argues certain convictions are not supported by substantial evidence; instructional error; ineffective assistance of counsel; and that the trial court abused its discretion in denying his motion for substitute counsel. We affirm.

BACKGROUND

A.

Ranger, his wife (Mother), and their nine children lived together until December 2011, when the oldest child, M., left home at age 16 after reporting physical abuse.

The prosecution presented evidence that Ranger subjected Mother and all nine children to ongoing emotional and physical abuse. The children were told, from as far back as they can remember, that Ranger was the head of the household and religiously

[1] Undesignated statutory references are to the Penal Code.

superior. They believed their only way into heaven was to obey Ranger. Ranger isolated his children and restricted their clothing, food, bathing, and education. The children often had only oatmeal and vegetables to eat while Ranger had his own food, including meat, fresh fruit, and sweets. The children were ostensibly home schooled but, in fact, essentially taught themselves to read.

Ranger beat the children and Mother regularly in response to any disobedience or simply to vent his anger at things that had nothing to do with them. He beat Mother when she was pregnant, and she suffered several miscarriages. The parents coached the children to lie about their physical abuse to anybody who inquired.

The childrens' accounts of physical abuse were corroborated by a Vacaville resident who, in September 2008, witnessed Ranger grab one of the children "very firmly by the arm," swing him around, and yell in the child's face. The witness also saw Ranger grab another child by her hair, pull her out of a shopping cart by her hair, and then slap her across the face, with an open hand, "very hard." The witness said the child appeared to be about three years old and had just been sitting in the shopping cart not "doing anything wrong." The accompanying female adult did not react to either incident. The other children, meanwhile, "looked scared."

In January 2012, after M. left home, Ranger and Mother met with social workers. The social workers noticed bruises on Mother's wrist. Ranger suggested M. was mentally ill and blamed her for the family's problems. Ranger also volunteered, " '[a]s for these allegations of sexual abuse, I can't believe [M.] is saying this.' " Up to that point, however, M. had not told social workers about any sexual abuse. About a month later, and while she remained living outside of the family home, M. began disclosing sexual abuse. When two of the younger children (E. and H.) were placed in foster care, they also disclosed physical, emotional, and sexual abuse by Ranger. After Ranger was jailed pending trial, he coached Mother as to how she should discuss the accusations.

M., who was 21 years old at the time of trial, testified that Ranger first molested her when she was about four or five years old. At the time, the family lived in Crescent City. She described being in her underwear on the floor and feeling pain in her genitals.

She looked up and saw Ranger, in his underwear. "[A]t the time [she] didn't really know what was going on."

Later, when M. was eight or nine years old, Ranger touched her vagina on numerous occasions when she was sitting on his lap. Around that same time, Ranger had sexual intercourse with M. She testified: "I was on the floor. And [Ranger] was on top of me. And I just slid under his chest . . . he didn't have a shirt on. . . . I just saw his chest. He was back and forth, back and forth. And I kinda—at that point in time, I kind of left my body. . . . I saw what was happening." She knew Ranger was having sex with her because she could "feel him inside" her. She also suffered vaginal pain and bleeding. M. testified that, after the family moved to Vacaville and when she was between 11 and 14 years old, Ranger frequently masturbated in her room at night. On these occasions, Ranger would pull aside M.'s covers and skirt while she pretended to sleep. On more than five occasions in this time frame, Ranger also climbed in bed with M. and had intercourse with her. M. woke up feeling pain in her genitals "almost all the time," and on one particular occasion, she woke up with a bruise on the inside of her thigh.

Between 2006 and November 2009, while the family remained living in Vacaville, M. and some of her siblings observed two of the other children, E. and H., having sex. When M. interrupted, Ranger came out of his room and said that the children were not allowed to discuss this incident. Before trial, E. confirmed M.'s account to investigators and to his foster mother. In particular, during a pretrial interview played for the jury, E. described Ranger threatening to shoot him if he refused to have sex with H. Ranger explained there would be a camera filming them and demonstrated how to touch H.'s genitals. When H.'s foster mother confronted Mother about the allegation, Mother responded, "Don't worry about it. And don't say anything to the doctor because that's normal for kids to do." E. also told investigators, before trial, that he saw Ranger touch M.'s vagina.

At trial, E. acknowledged having once laid on top of H. while naked, but denied that Ranger forced the two to have sex or abused him in any way. E. blamed M. and a

police officer, who E. claimed had pressured him to falsely accuse Ranger.[2] E. also acknowledged recanting his accusations around the same time that he resumed contact with Mother.

N. testified that, when he was five years old, Ranger "made [him and four-year-old G.] take off all our clothes . . . and lay on top of each other and kiss." N. obeyed Ranger's command after Ranger threatened to beat N. if he did not comply. Before trial, N. said he and G. also orally copulated each other and that Ranger took pictures. At trial, N. said, "[t]hat did not happen."

The prosecution's expert on child abuse testified that, after interviewing three of the children in 2015, he concluded that all three had suffered severe psychological trauma indicative of long-term abuse.

Defense witnesses suggested M. fabricated the abuse allegations against Ranger so she could escape her religiously strict upbringing and continue a concealed sexual relationship with another adult man. Both Ranger and Mother testified he was a kind and loving father and denied he perpetrated any abuse – sexual, physical, or emotional – against Mother or the children. When police searched the family's computers, pursuant to a warrant of which Mother had advance knowledge, no pornography was found. The defense also presented evidence of M.'s and N.'s previous denials of sexual abuse.

B.

At the close of evidence, the trial court dismissed counts five and seven on the People's motion. The jury returned guilty verdicts on all 10 remaining counts. The jury also found true enhancement allegations—that Ranger committed lewd acts against more than one victim (former § 667.61, subds. (b), (e); § 1203.066, subd. (a)(7)) and had substantial sexual contact with a child under the age of 14 (§ 1203.066, subd. (a)(8)). The trial court sentenced Ranger to an aggregate term of 150 years to life in state prison.

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[2] Specifically, E. testified that before his recorded interview, a police officer threatened to stab himself with a knife and blame it on E. if E. did not falsely accuse Ranger. The officer denied E.'s accusation.

DISCUSSION

A.

Ranger contends there is insufficient evidence of duress to support the jury's verdicts on counts one, three, and four. We disagree.

1.

When faced with a substantial evidence challenge, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate witness credibility. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "A reviewing court must accept logical inferences the [fact finder] might have drawn from the circumstantial evidence. [Citation.] ' "A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.' " ' " (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416–1417, disapproved on another point by *People v. Farwell* (2018) 5 Cal.5th 295, 304 & fn. 6.)

2.

Count one alleged aggravated sexual assault of M. by rape, in violation of section 269, subdivision (a)(1). That section provides: "Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261." (§ 269, subd. (a)(1).) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator "[w]here it is accomplished against a person's will by means of force, violence, *duress*, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2), italics added.) Section 261 also specifically defines "duress" to mean "a direct or implied threat of force, violence, danger, or retribution

sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress." (§ 261, subd. (b).)

In counts three and four, Ranger was charged with forcible lewd acts (§ 288, subd. (b)(1)) on M. Count three involved Ranger pulling back the bed sheets and pulling up M.'s dress while he masturbated. Count four involved Ranger putting his hand up M.'s dress and touching her genitals when she was eight or nine years old. "[S]ection 288, subdivision (b)(1), makes it a felony to commit a lewd act upon a child under the age of 14 years 'by use of force, violence, *duress*, menace, or fear of immediate and unlawful bodily injury . . . .' " (*People v. Leal* (2004) 33 Cal.4th 999, 1001, italics added.) As used in section 288, subdivision (b)(1), "duress" has an almost identical, albeit slightly broader, definition to that quoted above. (*Id.* at p. 1004 [including threat of hardship].)

Ranger emphasizes the absence of direct threats in the evidence underlying counts one, three, and four, and maintains "psychological coercion" alone is insufficient to establish duress. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321.) " 'At a minimum there must be an implied threat of "force, violence, danger, . . . or retribution." ' " (*Ibid.*) Ranger misplaces his reliance on *Espinoza*, in which the reviewing court found insufficient evidence of duress. In that case, the victim, aged 12, suffered no physical abuse, and the only ground for the victim's fear was that the defendant, her father, had continued to molest her. (*Id.* at pp. 1292, 1320-1321.)

Here, reviewing the record in the light most favorable to the judgment, there was substantial evidence of implied threats of force or retribution. M. testified that, *as far back as she could remember*, Ranger had subjected her, the other children, and Mother to physical abuse in response to their disobedience. Ranger also isolated M., controlled her diet, and convinced her, from an early age, that she would not go to heaven without his approval. M. was eight or nine years old at the time the earliest challenged offenses

occurred. There was also evidence that M. was terrified of her father, who was 45 years older than her.

Taking all of these circumstances together, and noting that M.'s earliest memories of physical and emotional abuse would necessarily predate and enable the challenged offenses, we conclude there was ample evidence of duress to support the verdicts. (See *People v. Thomas* (2017) 15 Cal.App.5th 1063, 1072-1073 [jury could reasonably find father's ongoing violence against his young child "constituted an implied threat of violence or danger if she did not submit to his sexual abuse"]; *People v. Garcia* (2016) 247 Cal.App.4th 1013, 1024 ["[a]fter defendant had repeatedly threatened to harm [the victim's] mother, all of his subsequent acts of abuse were facilitated by the duress endangered by these threats"].) "When the victim is young and is molested by her father in the family home, duress will be present in all but the rarest cases." (*People v. Thomas, supra,* 15 Cal.App.5th. at pp. 1072-1073.)

B.

Ranger also challenges the trial court's instruction regarding the force element of aggravated sexual assault of a child by rape (§ 269, subd. (a)(1)). His argument is unpersuasive.

1.

A trial court has a sua sponte duty to instruct the jury on general principles of law applicable to the evidence and necessary to the jury's understanding of the case. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Accordingly, the court must instruct on all the elements of the charged offenses. (*People v. Williams* (2009) 170 Cal.App.4th 587, 638–639.) We independently review an instruction to assess whether it accurately states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We consider whether it is reasonably likely that the trial court's instructions, considered as a whole, misled the jury. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.)

2.

The jury was given a modified version of CALCRIM No. 1000: "To prove the defendant is guilty of the crime of rape by force, fear, or threats, the people must prove

that: 1, the defendant had sexual intercourse with a woman or girl; 2, that he and the woman or girl were not married to each other at the time of the intercourse; 3, the woman or girl did not consent to the intercourse; and 4, the defendant accomplished the intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or girl or to someone else. [¶] . . . [¶] A child under the age of 14 is legally incapable of consenting to sexual relations. It is not a defense that a child under the age of 14 may have actually consented to the act. [¶] *Intercourse is accomplished by force if a person uses enough physical force to overcome the woman's or girl's will*." (Italics added.)

Ranger contends the italicized language was incorrect because the prosecution needed to prove force "substantially different from or substantially greater than that necessary to accomplish the lewd act itself." We assume Ranger did not forfeit his current challenge by failing to object in the trial court. (See § 1259; *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Nonetheless, he has not shown the trial court's definition of force was incorrect with respect to the charged offense.

"[T]he definition of the word 'force' in sexual offense statutes depends on the offense involved." (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1200.) "To convict *for committing a forcible lewd act* against a child in violation of section 288, subdivision (b), the prosecution must prove that the defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*Ibid.*, italics added; accord, *People v. Soto,* (2011) 51 Cal.4th 229, 242.) In contrast, our Supreme Court has specified the requisite amount of force for a *rape* conviction is different: " 'physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [woman or girl].' " (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023-1024, 1027.) We are bound by *Griffin* and conclude its definition of force also controls aggravated sexual assault of a child by rape because section 269, subdivision (a)(1), specifically incorporates the rape statute. (*Asencio, supra,* at p. 1200; *People v. Guido* (2005) 125 Cal.App.4th 566, 574.)

The *Griffin* definition of force is indistinguishable from the trial court's instruction in this case. Ranger is correct that consent is not a defense to the crime of committing a lewd act on a child because a child under the age of 14 cannot consent to sex acts with an adult. (*People v. Soto, supra*, 51 Cal.4th at pp. 233, 238.) But Ranger misplaces his reliance on this and other authorities involving different offenses. (See, e.g., *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1003-1004.) "[S]ignificant differences between [lewd acts on a child and rape] argue strongly against importing definitions from one context to the other." (*People v. Soto, supra*, at p. 243.) Ranger has shown no error.

C.

Ranger maintains that the trial court erred in instructing the jury, in accordance with CALCRIM No. 370, that the People need not prove motive. We proceed to the merits and do not address Ranger's alternative ineffective assistance of counsel argument, assuming that Ranger's current claim was not forfeited by his failure to object below. Ranger's challenge is meritless.

The trial court instructed the jury with CALCRIM No. 370, which states: "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show defendant is not guilty." The trial court also instructed the jury on the mental state required for the lewd act charges—i.e., that the People must prove the "defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." (CALCRIM No. 1110; accord, *People v. Martinez* (1995) 11 Cal.4th 434, 442 & fn. 5, 452.)

In suggesting CALCRIM No. 370 confused the jury and relieved the prosecution of its burden to prove the intent required for the lewd act counts, Ranger misplaces his reliance on *People v. Maurer* (1995) 32 Cal.App.4th 1121. That case is distinguishable because it involved a statute that, unlike section 288, required the prosecution to prove

motive as an element. (*Maurer*, at pp. 1125–1127 [§ 647.6 required proof that defendant was " 'motivated by an unnatural or abnormal sexual interest in children' "].)

In cases decided after 1995, our Supreme Court has made clear that motive and intent are not synonymous. (*People v. Cash* (2002) 28 Cal.4th 703, 738; *People v. Hillhouse* (2002) 27 Cal.4th 469, 504; cf. *People v. Martinez, supra,* 11 Cal.4th at pp. 443 & fn. 7, 444, 450-451 & fn. 16 [using "sexually motivated" as a synonym for intent required to prove lewd act].) "Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*Hillhouse*, at p. 504.) Contrary to Ranger's assertion, there is no reasonable likelihood the jury ignored the intent element of the lewd act charges. (See *Cash*, at p. 739 [because "instructions as a whole did not use the terms 'motive' and 'intent' interchangeably," there was "no reasonable likelihood that the jury understood those terms to be synonymous"].)

D.

We reject Ranger's contention that his trial counsel was ineffective because counsel declined to file a motion for new trial based on insufficiency of the evidence. (See § 1181, subd. 6 [trial court may grant a new trial "[w]hen the verdict or finding is contrary to law or evidence"].)

1.

Under both the United States and California Constitutions, a criminal defendant has the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-686; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To establish ineffective assistance of counsel, a defendant must show (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness, under prevailing professional norms, and (2) the deficient performance was prejudicial, rendering the results of the trial unreliable or fundamentally unfair. (*Strickland, supra,* at pp. 688, 692; *Ledesma, supra,* at pp. 216-217.)

"[W]e begin with the presumption that counsel's actions fall within the broad range of reasonableness, and afford 'great deference to counsel's tactical decisions.'

[Citation.] Accordingly, we have characterized defendant's burden as 'difficult to carry on direct appeal,' as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had ' " 'no rational tactical purpose' " ' for an action or omission [citation]." (*People v. Mickel* (2016) 2 Cal.5th 181, 198.) " ' "[I]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

2.

The record before us does not disclose why Ranger's trial counsel decided not to file a motion for new trial based on insufficiency of the evidence. Pointing out that the standard of review for a new trial motion on this ground is more favorable than the standard of review on appeal (*People v. Carter* (2014) 227 Cal.App.4th 322, 328), Ranger contends that his attorney had no satisfactory reason not to raise insufficiency of the evidence in a motion for new trial.

Ranger is correct that an insufficiency of the evidence argument is subject to a more favorable standard of review on a motion for new trial than on appeal. (See *People v. Carter, supra,* 227 Cal.App.4th at p. 327; accord, *Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.) We nonetheless agree with the People that Ranger's trial counsel could have made a reasonable tactical decision to decline to challenge the evidence.

To support his position that there could be no satisfactory tactical reason for declining to file the motion in this case, Ranger relies on a statement made by the trial court at sentencing, contending it indicates that the court would have granted a motion for new trial. The trial court said, "[A]t the conclusion of the case I was asking myself, I wonder how this jury is going to decide this case, because both sides presented their story very well, their version of what they believed happened very well. [¶] The jury didn't take long to reach a decision. In retrospect, I ask myself, I wonder why that was the

case? And the answer came to me pretty clearly. It's because of the severe mental damage that the children who were found by the jury to be victims in this case suffered. Faced with two different versions here, the fact that the children have sustained such severe damages as a result of your behavior, the behavior for which you have been found guilty by the jury, I'm persuaded, helped convince them that what they testified to was the truth, notwithstanding the alternative explanation that the defense presented to the jury."[3]

Reading the court's statements in context, we do not agree the trial court found Ranger's testimony more credible or even suggested this was a particularly close case. The trial court was merely emphasizing that defense counsel had effectively presented the defense theory and that it was the jury's job to determine the credibility contest. The trial court also explained how the children's evident trauma made Ranger's version of events—that the children had not been abused—*unbelievable*.

Because the record fails to affirmatively demonstrate that counsel's omission had no reasonable tactical basis, we must presume Ranger's attorney "chose not to file a new trial motion he deemed to be without merit." (*People v. Thurman* (2007) 157 Cal.App.4th 36, 48.) Ranger has failed to establish ineffective assistance of counsel.

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[3] The trial court made similar comments during a hearing on Ranger's request for substitute counsel: "[T]he defense in this case was purely and simply that [M.] lied and the other children were induced by her to lie; and that there was a motive for doing this. . . . [¶] . . . And that message came out loud and clear. The defense that was provided here by [defense counsel] was exactly that . . . in large detail. [¶] In fact, when the case was over, I was wondering to myself, boy, this might be really hard for the jury to decide, because, on the one hand, you have the testimony of children, in some instances, testimony that had been contrary to what they had previously indicated, . . . about these crimes having been committed. And, on the other hand, defense had presented extensive evidence that there was no proclivity to commit sexual offenses; there were no instances of any inappropriate touching other than those that were the basis of charging of the crime; . . . no one had observed any inappropriate sexual conduct by [Ranger]; the computers didn't disclose any such sexual conduct. So it was, really, who do you believe?"

E.

Finally, Ranger argues the trial court abused its discretion in denying his posttrial motion to substitute appointed trial counsel. We disagree.

1.

When a defendant complains about the adequacy of appointed counsel, the trial court must permit the defendant to articulate the basis for his concerns so that the court can determine if they have merit and, if necessary, appoint new counsel. (*People v. Marsden* (1970) 2 Cal.3d 118, 123-125 (*Marsden*); accord, *People v. Smith* (1993) 6 Cal.4th 684, 691 (*Smith*).) However, the court is not required to appoint new counsel whenever the defendant alleges his trial attorney provided ineffective assistance. (*Smith,* at pp. 695-696; *People v. Sanchez* (2011) 53 Cal.4th 80, 90.) "[T]he trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Taylor* (2010) 48 Cal.4th 574, 599.) Mere distrust or inability to get along with counsel is not sufficient grounds for substitution. (*Id.* at p. 600.)

The same standards apply after trial. (*Smith, supra,* 6 Cal.4th at p. 695.) "Whenever the motion is made, the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*. But the decision must always be based on what has happened in the *past.*" (*Ibid*.) We review the ruling on a *Marsden* motion for abuse of discretion. (*People v. Taylor, supra,* 48 Cal.4th at p. 599.)

2.

After the jury's verdicts had been rendered, Ranger made a *Marsden* motion, asking the court to substitute new counsel. The trial court conducted a hearing, outside the presence of the prosecutor and the public, at which time Ranger raised several

complaints. The trial court found no ineffective assistance of counsel, denied the *Marsden* motion, and proceeded to pronounce Ranger's sentence.

3.

Ranger contends the trial court should have granted his request for substitute counsel because appointed counsel provided inadequate representation, as evidenced by: (1) defense counsel's failure to file a motion for new trial arguing insufficiency of the evidence; (2) defense counsel's failure to challenge prosecutorial misconduct; and (3) defense counsel's failure to request a trial transcript. We disagree.

Assuming his first claim was preserved despite Ranger's failure to raise it below, either in Ranger's written submissions or in response to the trial court's inquiry at the hearing, Ranger nevertheless fails to show his right to counsel was substantially impaired. The determination of which motions to file is a tactical matter under counsel's control (*People v. McKenzie* (1983) 34 Cal.3d 616, 631), and "tactical disagreements between a defendant and his attorney or a defendant's frustration with counsel are not sufficient cause for substitution of counsel." (*People v. Streeter* (2012) 54 Cal.4th 205, 231.)

Second, Ranger challenges the trial court's finding that defense counsel was not ineffective in failing to object to asserted prosecutorial misconduct. In his *Marsden* motion, Ranger complained only generally about defense counsel's failure to object to prosecutorial misconduct. The trial court denied the motion, stating, "I sat through that whole trial [and] I saw no evidence of prosecutorial misconduct in this case at all."

On appeal, Ranger complains of two separate instances in the prosecutor's closing argument in which the prosecutor purportedly attempted to shift the burden of proof: when the prosecutor argued (1) that the evaluation of witness credibility should be "based in common sense and reason," similar to what jurors do in their everyday lives, and (2) that Ranger's "denial alone is not enough to create a reasonable doubt" without evaluation of "whether he's telling the truth or not."

It is improper for the prosecutor to misstate the law, especially when the misstatement lowers the prosecution's burden of proof. (*People v. Centeno* (2014) 60 Cal.4th 659, 666.) " 'When [a prosecutorial misconduct] claim focuses on comments

made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror. [Citations.] If the remarks would have been taken by a juror to state or imply nothing harmful, they obviously cannot be deemed objectionable.' " (*People v. Tully* (2012) 54 Cal.4th 952, 1043.)

Neither of the prosecutor's comments was objectionable. The prosecutor was paraphrasing part of CALCRIM No. 226: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience." To be sure, "equating *proof beyond a reasonable doubt* to everyday decision-making in a juror's life lowers the burden of proof to a preponderance of the evidence." (*People v. Johnson* (2004) 119 Cal.App.4th 976, 985, italics added.) However, CALCRIM No. 226 "does not instruct jurors to use their common sense and experience in finding reasonable doubt, which could potentially conflict with the beyond a reasonable doubt standard, but only in assessing a witnesses' credibility." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1240.) The same is true of the prosecutor's argument. There is no reasonable likelihood that the jury, having been fully instructed on reasonable doubt, would have understood either of the prosecutor's comments as shifting the burden of proof to Ranger to disprove his guilt. (See *People v. Osband* (1996) 13 Cal.4th 622, 697.)

Ranger also complains that the prosecutor misled the jury when she argued Ranger's mention of sexual abuse allegations, during the January 2012 meeting with social workers, indicated a guilty conscience. The argument was addressed at the conclusion of the *Marsden* hearing. The trial court explained, "[The prosecutor] didn't say you gave a confession. She . . . developed evidence during the trial that you had denied [sexual abuse] at a time prior to those sexual allegations even having been brought. And she argued that that indicated a consciousness of guilt." We agree with the trial court that this was nothing more than fair comment on the inferences that could be drawn. (*People v. Tully, supra,* 54 Cal.4th at p. 1044; *People v. Osband, supra,* 13 Cal.4th at p. 696.) It is irrelevant that other inferences could also be drawn. (*People v.*

Harrison (2005) 35 Cal.4th 208, 249 [“ ‘Whether the inferences the prosecutor draws are reasonable is for the jury to decide’ ”].) Ranger has not demonstrated misconduct or ineffective assistance of counsel.

Finally, Ranger contends the trial court was compelled to appoint new counsel because his trial counsel was ineffective in not requesting a free trial transcript. The trial court denied Ranger’s request for a transcript, explaining, “There may be some circumstances where a defendant may be entitled to that. This is not one of them. You took extensive notes during the course of the trial, as reflected by the *Marsden* motion that you filed.”

Although transcripts are essential for a criminal appeal, they are not always necessary for the purpose of a new trial motion because such a motion will be heard and ruled on at a time when the testimony is fresh in everyone’s mind. (*People v. Bizieff* (1991) 226 Cal.App.3d 1689, 1702.) Trial transcripts for the purpose of preparation of new trial motions should be provided only when the defendant shows a particularized need. (*People v. Markley* (2006) 138 Cal.App.4th 230, 241; accord, *Bizieff, supra,* at p. 1702.) A defendant does not show a need for a trial transcript for purposes of a new trial motion simply by generally asserting “ineffective assistance of counsel.” (*Bizieff, supra*, at pp. 1702-1704.) Here, Ranger made no particularized showing either below or on appeal.

The record demonstrates the trial court made sufficient inquiry into the grounds for Ranger’s *Marsden* motion. Ranger has shown no abuse of discretion.

DISPOSITION

The judgment is affirmed.

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BURNS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.

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